

STATE OF CALIFORNIA
BEFORE THE COMMISSION ON JUDICIAL PERFORMANCE

**IN THE MATTER CONCERNING
JUDGE BRETT CARROLL KLEIN**

**DECISION AND ORDER IMPOSING
PUBLIC ADMONISHMENT**

This disciplinary matter concerns Judge Brett Carroll Klein, a judge of the Los Angeles Superior Court since 2000. The judge's current term began in January 2003; he previously was a judge of the Los Angeles Municipal Court from 1990 to 2000. Judge Klein and his attorney, Mr. Edward P. George, Jr., appeared before the commission on October 13, 2004 pursuant to rule 116 of the Rules of the Commission on Judicial Performance; good cause appearing, the Commission on Judicial Performance issues this public admonishment pursuant to article VI, section 18(d) of the California Constitution, based upon the following Statement of Facts and Reasons:

STATEMENT OF FACTS AND REASONS

From 1999 through 2002, Judge Klein presided over the case of *Butler et al. v. Terry*, case number BC 204642, in which two tenants sued their landlord for injuries caused by a ceiling falling on them. Judge Klein abused his authority and displayed bias and embroilment through actions he took after a judgment he had entered was reversed by the Court of Appeal.

In *Butler*, after the defendant failed to obey certain discovery orders, Judge Klein struck the defendant's answer and the matter proceeded to a default prove-up hearing to assess damages. At the outset of that hearing, held in October 2000, Judge Klein denied the defendant's request that the court hear a motion for reconsideration of its order striking her answer. Thereafter, testimony was given by one of the plaintiffs and an orthopedic surgeon; the surgeon testified that the cost of diagnosis and treatment of each plaintiff was approximately \$3200. Because the defendant was in default, there was no cross-examination or other participation by defendant's counsel. At the end of the hearing, Judge Klein found that fair compensation to the plaintiffs totaled \$200 for medical expenses and \$1050 for other damages, \$300 of which was not compensable. The judge then ordered nominal damages of \$1 to each plaintiff, on the ground that awarding damages would deprive the defendant of due process of law because the plaintiffs' statement of damages was first served on her after she engaged in the conduct that resulted in entry of her default as a terminating sanction for the discovery violation. The judge concluded by saying, "I suppose this case illustrates adage [sic] 'Be careful what you ask for. You might get it.'" The judge then asked defendant's counsel whether the motion for reconsideration of the court's order striking the defendant's answer was withdrawn; counsel said that it was.

The plaintiffs appealed. The Court of Appeal reversed the judgment. The appellate court found that Judge Klein's determination that \$100 each would adequately compensate the plaintiffs for their medical expenses was arbitrary and capricious. The Court of Appeal also held that the defendant had received adequate notice of her potential liability prior to entry of the default judgment. The instructions to the trial court on remand were "to enter a new default judgment in accordance with the evidence [plaintiffs] presented at the prove-up hearing on October 24, 2000." Judge Klein's court received the remittitur from the Court of Appeal on or about July 1, 2002.

On August 2, 2002, Judge Klein on his own initiative issued an order setting a hearing on the defendant's previously withdrawn motion for reconsideration of the order striking defendant's answer.

Immediately after receiving a copy of this order, plaintiffs' counsel, who previously had been told that the case had not yet been reassigned after the remittitur, sent a letter to the court advising that the plaintiffs would be filing a peremptory challenge to disqualify Judge Klein under Code of Civil Procedure section 170.6. Counsel also expressed the view that Judge Klein's order setting a hearing on defendant's motion for reconsideration was in "complete disregard" of the Court of Appeal's instructions on remand.

On August 5, 2002, plaintiffs filed the challenge under Code of Civil Procedure section 170.6. On the same day, Judge Klein issued an order striking that challenge as untimely as to "any proceedings other than conduct of a new trial." On August 8, 2002, plaintiffs filed a challenge for cause against Judge Klein pursuant to Code of Civil Procedure section 170.1. On August 13, 2002, Judge Klein issued an order striking the Code of Civil Procedure section 170.1 challenge "because on its face, it discloses no legal grounds for disqualification."

On September 9, 2002, plaintiffs filed a petition for writ of mandate in the Court of Appeal contesting Judge Klein's striking of the peremptory challenge filed on August 5, 2002. The Court of Appeal ultimately denied the petition as untimely but nonetheless expressed its view that the petition had merit, and reminded the trial court of its inherent authority to reconsider the two challenges.

On September 18, 2002, the plaintiff filed another peremptory challenge under Code of Civil Procedure section 170.6.

On October 18, 2002, Judge Klein heard and granted the defendant's previously withdrawn motion for reconsideration, which had been refiled on September 11, 2002. He went on to rule that the defendant could not present certain evidence at trial unless specified conditions were met. The judge then accepted the plaintiffs' peremptory challenge under Code of Civil Procedure section 170.6. The plaintiffs thereupon petitioned the Court of Appeal for a writ of mandate.

In its decision issued December 23, 2002, the Court of Appeal issued a writ of mandate ordering Judge Klein to vacate his order granting reconsideration, and compelling compliance with its remand directions. In its decision, the Court of Appeal noted that Judge Klein, after ruling at the October 18 hearing that the defendant could only call certain witnesses if she provided their names and addresses “at least 60 days before the postreversal [sic] trial date,” had “refused to comment further or provide any explanation” when asked by counsel to explain whether there would be a new trial rather than simply a new judgment. (*Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 981.) The appellate court then stated that “logic leads to no other conclusion but that the trial court’s order materially departed from our directions on remand” and held that the order was “unauthorized and void.”

The appellate court stated:

Despite our clear and specific directions, the trial court issued an order granting a motion for reconsideration of a ruling that was rendered prior to the issuance of the judgment. The effect of the trial court’s order was to allow further trial court proceedings that would be contrary to our clear directions on remand. Because the trial court’s order materially differed from our remand directions, it was unauthorized and void.

(*Butler v. Superior Court*, *supra*, 104 Cal.App.4th at p. 981.)

The Court of Appeal continued:

When an appellate court’s reversal is accompanied by directions requiring specific proceedings on remand, those directions are binding on the trial court and *must* be followed. Any material variance from the directions is unauthorized and void.

(*Butler v. Superior Court*, *supra*, 104 Cal.App.4th at p. 982, emphasis in original.)

The commission found that Judge Klein’s actions after the appellate reversal of the judgment he rendered at the default prove-up hearing displayed abuse of authority, bias and embroilment. After determining that Judge Klein’s actions at the default prove-up hearing were arbitrary and capricious, the Court of Appeal reversed and remanded the case with express directions to award damages in accordance with the undisputed evidence introduced by plaintiffs at the prove-up hearing. In light of these instructions from the Court of Appeal, Judge Klein was obligated to redetermine plaintiffs’ damages. In direct violation of the appellate court’s order, Judge Klein did not award damages as directed but instead, on his own initiative and without authority, resurrected the defendant’s previously withdrawn motion to vacate the order striking defendant’s answer, and set the motion for hearing. He then struck both the peremptory challenge that was immediately filed by the plaintiffs, and plaintiff’s subsequent challenge for cause. Thereafter, even though the Court of Appeal expressed its view that Judge Klein had improperly rejected the peremptory challenge, and

suggested that he reconsider his order striking the challenge for cause, Judge Klein took no further action on either challenge, and delayed accepting a second peremptory challenge until after he granted the defendant's motion for reconsideration and vacated his earlier ruling striking her answer.

The judge's actions in *Butler, et al. v. Terry* following the appellate reversal were contrary to canon 2A, which requires judges to respect and comply with the law and conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. As the California Supreme Court stated in *Broadman v. Commission on Judicial Performance* (1998) 18 Cal.4th 1079, 1103, "there is a compelling public interest in maintaining a judicial system that both is in fact and is publicly perceived as being fair, impartial, and efficient." Thus, "[j]udges...cannot be advocates for the interests of any parties; they must be, and be perceived to be, neutral arbiters of both fact and law [citation] who apply the law uniformly and consistently." (*Id.* at p. 1100.) In *Fletcher v. Commission on Judicial Performance* (1998) 19 Cal.4th 865, 910 the California Supreme Court reaffirmed these principles in finding that a judge engaged in misconduct when he created the public impression that he had abandoned the judicial role to become an advocate for his own ruling.¹ Similarly, the commission and the California Supreme Court in *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 858-861 found misconduct where a judge failed to remain objective and became personally involved in three matters before him.

Judge Klein's conduct as set forth above was, at a minimum, improper action within the meaning of article VI, section 18(d) of the California Constitution. His actions were not simply legal error but reflected a flagrant disregard of the order of the Court of Appeal remanding the case for a redetermination of damages, as well as an abandonment of his role as a neutral arbiter.

Commission members Justice Vance W. Raye, Mr. Marshall B. Grossman, Judge Frederick P. Horn, Mr. Michael A. Kahn, Mrs. Crystal Lui, Ms. Patricia Miller, Mrs. Penny Perez, Judge Risë Jones Pichon, and Ms. Barbara Schraeger voted to impose a public admonishment. Mr. Jose C. Miramontes did not participate in this matter. There is currently one public member vacancy on the commission.

Dated: October 20, 2004

Hon. Vance W. Raye
Chairperson

¹ In *Fletcher*, the commission and the court found that the judge engaged in willful misconduct because his actions were motivated by a personal conflict with a political rival.